

EXHIBIT A

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TRACY YVETTE SCOTT * 4:20-CV-2261
VS. * Houston, Texas
MIKE BLOOMBERG 2020, INC. * 2:58 p.m.
February 24, 2021

MOTION HEARING

BEFORE THE HONORABLE KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

Carrol G. Robinson
ROBINSON LAW GROUP
4203 Yoakum Blvd., Suite 310
Houston, Texas 77006
713.526.2900

FOR THE DEFENDANT:

Rex D. VanMiddlesworth
Jennifer Meghan McCaig
THOMPSON & KNOGHT, LLP
98 San Jacinto Blvd., Suite 1900
Austin, Texas 78701
512.469.6180

Gregory William Curry
THOMPSON & KNIGHT, LLP
1722 Routh Street, Suite 1500
Dallas, Texas 75201
214.969.1700

1 Court Reporter:
2 Johnny C. Sanchez, RPR, RMR, CRR
3 515 Rusk, #8004
4 Houston, Texas 77002
5 713.250.5581

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1 THE COURT: I hope you survived last week
2 with undue trouble. We'll take appearances of counsel,
3 beginning with plaintiff Scott.

02:58:38

4 MR. ROBINSON: This is attorney Carroll
5 Robinson for plaintiff.

6 THE COURT: Hello, Mr. Robinson.

7 MR. ROBINSON: How are you doing, Your
8 Honor?

9 THE COURT: Okay.

02:58:44

10 MR. VanMIDDLESWORTH: Yes, Your Honor. This
11 is Rex VanMiddlesworth for Mike Bloomberg 2020, Inc. With
12 me on the call Meghan McCaig and Greg Curry.

13 THE COURT: Welcome to all of you.

02:59:03

14 This, of course, involves an unfortunate
15 set of circumstances which is different from whether it's
16 a viable claim for relief.

02:59:21

17 I do find, Mr. Robinson, that defendant's
18 motion is generally well taken. I want to give you all
19 the time in the world, though, that you wanted to respond
20 to it.

21 You can assume I've read the papers.

02:59:37

22 MR. ROBINSON: Well, Your Honor, essentially
23 the crux of the defense argument is not that there was no
24 promise. From all the filing before the Court is clear
25 that the statement was made before, concurrent with and

1 subsequent to employment, and their sole argument --

2 THE COURT: Mr. Robinson, I agree with you
3 entirely. Misrepresentations were made.

4 MR. ROBINSON: Yes. Absolutely, they were
5 made.

02:59:57

6 And the core argument from the defense is
7 they have a written agreement characterized as "at will
8 with a requirement for a written amendment," but Texas
9 case law recognizes the ability for a contract to be
10 orally modified. And the contract at issue in this case
11 is not even subject to the statute of fraud because it was
12 performable in less than one year.

03:00:16

13 And so, if that's the case, the issue is
14 we have, our argument is there was an oral modification to
15 the contract simply in terms of the term, that no change
16 in the payment for pay period, except simply that it went
17 from an at-will contract to a contract at term by oral
18 modification made after the employee was brought onboard.

03:00:37

19 THE COURT: But didn't the language in the
20 contract always call for at-will employment?

03:00:55

21 MR. ROBINSON: But Texas law recognizes that
22 a contract can be subject to oral modification. That's
23 the argument we're having. I mean, if it's subject to
24 oral modification and a promise was made, if you accept
25 that the written document is the contract at issue, then

03:01:17

1 the question is, was the modification made by the oral
2 promise after she was employed that she would be employed
3 until November 2020, and Texas law recognizes that even a
4 contract subject to the statute of fraud -- which this one
5 is not -- there can be an oral modification.

03:01:39

6 THE COURT: But even if we accept all of
7 that as true, Texas law would not permit reliance on a
8 statement to *Vanity Fair* or a statement to NBC, or report
9 by NBC news, or a *Texas Monthly* excerpt. That's not the
10 kind of way in which you would modify a written contract,
11 is it?

03:01:57

12 MR. ROBINSON: Well, Your Honor, the
13 affidavit filed by Tracy Scott in the amended complaint
14 says she was told that she would be employed until
15 November 2020 by the leadership team of the Bloomberg
16 campaign team in Texas, Dr. Carla Brailey and Ms. Turner.
17 This is exactly the point of why the case shouldn't be
18 dismissed at the pleading stage because I'm still entitled
19 to discovery to confirm in fact that the statement was
20 made because it's on documents produced by the campaign,
21 and discovery would at least allow me to talk to the
22 lawyers, the HR folks about why, in such a sophisticated
23 operation, they were still out publicly making those
24 promises after employment of Ms. Scott and others, but
25 specifically of Ms. Scott, and why they allowed the Texas

03:02:16

03:02:35

03:03:01

1 leadership to make the promise to her, which is validated
2 by the fact that other Texas employees were also made the
3 same promise after employment.

4 THE COURT: I understand what you're saying.

03:03:24 5 Let me say, one of my former law clerks was caught up with
6 the very same problem. He signed up for campaign, too. I
7 do recall the statements that were made. I recall
8 publicly that was said that there would be employment
9 until the election. And I'm disappointed in the Bloomberg
03:03:44 10 campaign they did not honor that commitment, but I think
11 that's different from whether we have a contract
12 modification.

13 Let me hear from Mr. VanMiddlesworth.

14 MR. VanMIDDLESWORTH: Thank you, Your Honor.

03:04:01 15 In October, this Court dismissed
16 plaintiff's claim for breach of contract promissory
17 estoppel.

18 THE COURT: Yes. I know.

19 MR. VanMIDDLESWORTH: There's nothing that
03:04:08 20 changes that.

21 We agree, Your Honor, you pointed out
22 there is a specific employment contract, it is -- it says
23 it can be terminated by either party at any time, and so
24 on?

03:04:21 25 Texas law takes written agreements

1 seriously. And then once plaintiffs sign, that sign could
2 not be more clear on the terms of the agreement. And not
3 only does the amended complaint not salvage these claims,
4 but it actually makes even more clear that should be
5 dismissed.

03:04:39

6 As you know, there are a bunch of articles
7 attached and linked to videos attached to the amended
8 complaint, but one wasn't. Footnote 1 in the complaint
9 the plaintiff includes a link to a video interview of the
10 candidate itself in January 2020 when Ms. Scott was
11 employed. And in that very interview that the candidate
12 specifically says that if he is not the nominee, the
13 campaign would not keep all of the 1,000 employees it had
14 hired for the primaries. That's about minute three and a
15 half in that link in the amended complaint.

03:04:58

03:05:22

16 Now, the amended complaint quotes some
17 later things that the candidate indicated he would keep
18 some staff and offices, but it ignores the specific
19 statement in that footnote in the complaint that the
20 candidate made clear that the plaintiffs -- neither
21 plaintiff nor anyone else would be guaranteed a job.

03:05:36

22 As to the oral modification. Again, the
23 original complaint complained representatives of the
24 campaign made statements about employment through
25 November, both before and after. And the amended

03:05:53

1 complaint reiterates those claims and puts them in bold
2 type, but it adds nothing new.

3 Those statements, even if made, would not
4 negate the specific at-will terms of the agreement. A
03:06:09 5 unilateral statement or promise to enhance the benefits of
6 an employment contract doesn't create an enforceable
7 obligation, be it a promise of a bonus, like in the
8 Casanova case, or pay increase, or extension of the term.
9 And the reason is that there's no consideration to support
03:06:31 10 that unilateral promise. That's what Casanova says quite
11 clearly. And the complaint makes it clear that there is
12 no consideration to support it.

13 Paragraph 33 says there were no changes to
14 plaintiff's obligations under the written agreement as a
03:06:47 15 result of this claim modification. Quote, the
16 modification did not materially alter any obligation.

17 So, in short, there is no consideration
18 and no meeting of the minds on any new contract. The
19 written contract under Texas law is valid and stands. And
03:07:06 20 even accepting plaintiff's allegations as true, which
21 there are not, there is no claim for a breach of oral
22 contract.

23 MR. ROBINSON: Your Honor, let me just
24 respond.

03:07:15 25 We have at least two Texas Supreme Court

03:07:38

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03:08:57

1 cases that go back to as early as 1955 that recognizes
2 that a written contract can be orally modified, even if
3 the written contract is subject to the statute of fraud,
4 and the argument that if the contract of the statement is
5 true and it was made, and the plaintiff agreed to stay on
6 and work until November, that's not consideration. Those
7 are discovery issues and oral -- and substantive argument
8 at trial. I mean, we're at the pleading stages, and
9 they're saying that this case should be dismissed without
10 discovery when in fact they admit that the statement was
11 made.

12 Texas Supreme Court law acknowledges that
13 a written contract could be orally modified, and that the
14 statements were made by Bloomberg. And even if you accept
15 that it was not everybody, they haven't -- I haven't had a
16 chance at this stage to prove that Ms. Scott, through
17 discovery, was one of the people that would be covered by
18 the extension of employment.

19 Then, more importantly, their own actions,
20 I mean, the last time on our last hearing, the Court
21 described it as magnanimous when in fact there was
22 evidence that they themselves waived the written
23 requirements for amendment to the contract.

24 So they can't have it always, they can't
25 start out saying the statement was made at the wrong time

1 but now was made at the right time, that the law --

2 THE COURT: I need --

3 MR. ROBINSON: Recognizes oral modification,
4 and that they themselves modified the contract
03:09:10 5 inconsistent with the modification provision, but that
6 provision should now be used at the pleading stage to
7 dismiss Ms. Scott's case.

8 THE COURT: We're going to take a short
9 break. I'll be right back with you.

03:09:29 10 **(Recessed at 3:09 p.m.)**

11 THE COURT: Okay. I'm sorry. We're back.

12 Mr. Robinson, I know you're a good lawyer,
13 I know you feel strongly about this case, but I think
14 under Texas law I can't offer you any relief. I don't
03:10:59 15 think there's a valid defense to the motion to dismiss.
16 I'm going to have dismiss it and dismiss all the pending
17 motions with it.

18 Thank you very much. Thank you.

19 **(Recessed at 3:11 p.m.)**

03:11:12 20 **(COURT CALLED BACK INTO SESSION)**

21 THE COURT: Okay. This is Keith Ellison.
22 Mr. Sanchez, the court reporter, is here with us.

23 Who is here for the respective parties.

24 MR. ROBINSON: That is Carroll Robinson, for
03:47:01 25 plaintiff Tracy Scott.

1 MR. VanMIDDLESWORTH: For defendant, Rex
2 VanMiddlesworth and Meghan McCaig.

3 THE COURT: Okay. I understand you got
4 disconnected right at the critical time Mr. Robinson?

03:47:13

5 MR. ROBINSON: Yes, I was.

6 THE COURT: I apologize for that. We're in
7 a whole new world trying to do things by telephone. I've
8 had plenty on my end, too. So I understand how it
9 happens.

03:47:31

10 In terms of the motion to dismiss, on the
11 question of contract modification, I'm afraid Ms. Scott
12 fails to plead facts sufficient to indicate a contract
13 modification based on subsequent oral promises.

03:47:55

14 She attempts to run on two sets of
15 promises. First, she alleges that various senior campaign
16 employees, including Mr. Bloomberg himself, made public
17 statements about continuing employment until November.
18 But these public statements cannot amount to a meeting of
19 the mind sufficient to modify express term of a written
20 contract. And the nature of the statements are such they
21 don't reference her in forming agreement specifically.

03:48:15

22 And, secondly, Ms. Scott attaches her own
23 affidavit to the response, and the same similar affidavit
24 to motion for leave to supplement the petition. Those
25 affidavits, of course, present a number of problems:

03:48:38

1 First, they're improper as they are not referenced in the
2 amended complaint, and the Court is limited to pleadings
3 when considering a motion to dismiss.

4 Those allegations could have been made at
03:48:51 5 the time the motion -- at the time the complaint was
6 amended, but they weren't. But more generally, more
7 fundamentally, I don't think these statements are
8 sufficiently specific to modify a existing contract.

9 Contract says, "No statement varying any
03:49:14 10 of the terms of the letter shall be enforceable unless set
11 forth in writing signed by a duly authorized officer of
12 the organization."

13 I acknowledge this is not a statute of
14 frauds contract, but still I think the language is hard to
03:49:27 15 ignore.

16 On promissory estoppel, Judge Rosenthal
17 said in a recent case here in the Southern District, "When
18 a contract between the parties, in other words, the
19 alleged promise, promissory estoppel is not applicable to
03:49:45 20 that promise. Instead, the wronged party must seek
21 damages under the contract."

22 And on the breach of express warranty,
23 it's a clever argument, the notion that Ms. Scott sold --
24 the campaign ["sold"] (inaudible) of Ms. Scott's services
03:50:04 25 of the opportunity to help defeat Donald Trump, but this

1 interpretation of the sale of services is not supported by
2 any case law that we've been able to find. It seems to be
3 a straightforward contract for employment.

4 So for all the those reasons, and despite
03:50:19 5 the greatest respect I have for you, Mr. Robinson, I'm
6 going to have to grant the motion to dismiss, and also
7 dismiss other pending motions.

8 MR. ROBINSON: No problem, Your Honor.

9 MR. VanMIDDLESWORTH: Thank you, Your Honor.

03:50:30 10 MR. ROBINSON: Your Honor, I just want make
11 sure I'm clear and it's on the record. There is a finding
12 of fact that in fact the affidavit reflects that a promise
13 was made, but you're saying it wasn't specific enough?

14 THE COURT: Let me think about that before I
03:50:49 15 agree to something.

16 I think the affidavit is improper. So it
17 can't be considered at all. And I think the statements
18 made contributed to Ms. Brailey are too general to be a
19 modification of a specific contract.

03:51:09 20 Thank you very much.

21 **(Recessed at 3:51 p.m.)**

CERTIFICATE

I, Johnny C. Sanchez, RMR, CRR, certify that as an Official Federal Court Reporter for the Southern District of Texas, Houston Division, I have transcribed the audio-recorded hearing of the foregoing entitled case to the best of my ability; that any inaudible designations are because of audio or telephonic interference that precluded me from understanding the words spoken; and that the foregoing typewritten matter contains a full, true and correct transcript of my understanding of the aforesaid proceedings as reported to the best of my skill and ability.

/S/ JOHNNY C. SANCHEZ

Johnny C. Sanchez, RPR, RMR, CRR
Official Court Reporter

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